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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 415

HEINEL MOTORS, INC., AND ELMER W. HEINEL, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 190) is reported in 149 F. 2d 815. The opinion of the District Court (R. 181a) is reported in 59 F. Supp. 759.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 191) was entered on June 13, 1945. The petition for a writ of certiorari was filed September

10, 1945. Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. Code 347 (a).

STATUTES AND REGULATIONS INVOLVED

The case involves Section 205 (e) of the Emergency Price Control Act of 1942 [1] as amended by Section 108 of the Stabilization Act of 1944 (58 Stat. 640, 50 U. S. C. App., Supp. IV, Sec. 925 (e)) and two regulations issued under Section 2 (a) (50 U. S. C. App., Supp. IV, Section 902 (a)) of the former Act, namely, Maximum Price Regulation 341 (8 F. R. 3971) and Revised Maximum Price Regulation 341 (8 F. R. 11176). For convenience the Emergency Price Control Act is hereinafter referred to as the Act, Maximum Price Regulation 341 as the original regulation, and Revised Maximum Price Regulation 341 as the revised regulation. The relevant provisions of the Act and the regulations are printed in the Appendix, *infra,* pp. 10–18. Both regulations established maximum prices for used commercial vehicles. The original regulation was issued on March 31, 1943 and became effective on April 26, 1943. It continued in effect until August 16, 1943 when it was superseded by the revised regulation.

[1] 56 Stat. 34, 50 U. S. C. App., Supp. IV, Sec. 925 (e).

STATEMENT

The action was brought by the Price Administrator to restrain petitioners from violating the Emergency Price Control Act and to recover a judgment against them for statutory damages under the provisions of Section 205 (e) of the Act. After trial on the merits, the Court granted judgment in favor of the Administrator for $2,125.60, and enjoined petitioners from violating the Act. The Circuit Court of Appeals affirmed the judgment.

The facts are not in dispute. Petitioners sold eleven used commercial vehicles between July 9, 1943, and August 15, 1943, at prices in excess of those permitted by the original regulation, and two used commercial vehicles between August 16, 1943, and October 31, 1943, at prices in excess of those permitted by the revised regulation. All of the vehicles were purchased by buyers for use in their respective businesses but not for resale.

QUESTIONS PRESENTED

1. Whether, under Section 205 (e) of the Act, the district court, in its discretion, could have awarded a judgment for less than the amount by which the prices at which the vehicles were sold exceeded the maximum prices established by the respective regulations.

2. Whether the excess of the prices at which the vehicles were sold over the maximum prices

established by the respective regulations was $2,125.60, as the court held, or only $556.78, as the petitioners contend.

3. Whether the cause of action arising from the sale of the vehicles at prices in excess of those permitted by the respective regulations was, under Section 205 (e) of the Act, vested in the Administrator or in the respective purchasers.

ARGUMENT

The judgment of the court below is clearly right. It is not in conflict with the decision of any other appellate court, and it does not decide any question of sufficient importance to warrant its being reviewed by this court.

1. The district court, in awarding a judgment based upon the overcharges, indicated that if he had discretion under the statute, he would have entered judgment in a smaller amount. Petitioners' contention that under Section 205 (e) of the Act the district court in its discretion could have awarded a judgment for less than the amount of the overcharges exacted by petitioners is plainly untenable. The section provides that a seller who violates a maximum price regulation "shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the

court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation." The section thus unequivocally provides that if the defendant proves that the violation was neither wilful nor the result of a failure to take practicable precautions against the occurrence of the violation he shall be liable for the amount of the overcharge or overcharges exacted or $25 whichever is the greater. If the section is construed as petitioners contend that it should be construed, then if the defendant, as in this case, fails to prove the absence of wilfulness and the taking of practicable precautions the court might award judgment for less than the amount of the overcharge or overcharges or $25, whichever is the greater. Congress obviously did not intend such an absurd result. Moreover, the legislative history of the section shows beyond dispute that $25 or the amount of the overcharge or overcharges was intended to be the minimum recovery in all cases. See the report of the House Conferees on the Stabilization Extension Act of 1944 (H. Rep. No. 1698, 78th Cong. 2d Sess., p. 23) and

the statement of Senator Wagner, Chairman of the Senate Conferees (90 Cong. Rec. 6368, June 21, 1944) quoted in the Appendix, *infra*, p. 19. *Hecht Co.* v. *Bowles*, 321 U. S. 321, upon which petitioners rely in support of their contention that the court might in its discretion award judgment for less than the minimum prescribed by the section was a suit in equity brought under Section 205 (a) of the Act and obviously has no application to an action for damages under Section 205 (e) of the Act.

2. Petitioners' contention that the court below incorrectly computed the amount the overcharges is equally without merit. Both the original regulation (Sec. 1360.504, *infra*, pp. 12–13) and the revised regulation (Sec. 7, *infra*, p. 15) prescribed two sets of maximum prices, one set for used commercial vehicles sold "as is", and a higher set for used commercial vehicles sold on a guaranteed basis. Both regulations provided that higher set of prices might be charged only if the seller delivered to the purchaser a guarantee in writing in a prescribed form. The prices prescribed by both regulations decreased with the age of the vehicle. The revised regulation (section 7, *infra*, p. 15) provided that the age of the vehicle should be computed from model year of the vehicle as designated by the manufacture and the original regulation (section 1360.504, *infra*, pp. 12–13) provided that it should be computed from the date the vehicle was delivered new to

the first purchaser if that date could be supported by the original bill of sale or the original invoice or certified copies thereof, otherwise from the first day of January of the year in which the vehicle was manufactured. The court below held that the maximum prices for the vehicles sold by petitioners were those prescribed by the regulations for vehicles sold "as is" and that the age of each of the vehicles should be computed from the first day of January of the year in which it was manufactured. Petitioners contend that the maximum prices for the vehicles were those prescribed for vehicles sold on a guaranteed basis, and that the age of each of the vehicles should be computed on the date it was delivered to the first purchaser. These contentions are plainly untenable. No written guaranty was delivered by petitioners to the purchasers of any of the vehicles as required by the regulation. In fact, the contracts of sale covering the vehicles sold on a deferred payment basis contained express disclaimers of any warranty. (R. 87a, 107a, 122a.) Moreover, the guaranty which petitioners claim that they extended to the purchasers by means of radio and newspaper advertisements and signs over their place of business related only to certain specified parts of the vehicles (R. 79a, 155a) whereas the guaranty required by the regulations covered every part of the vehicles. Petitioners were not, therefore, entitled to charge

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the maximum prices prescribed by the regulations for cars sold on a guaranteed basis. The dates on which the vehicles were delivered new to the first purchasers were not shown by the original bills of sale, original invoices or certified copies thereof. The court, therefore, was clearly right in holding that the age of each vehicle should be computed from the first day of January of the year of its manufacture.

3. The rulings below that the statute gives the right of action to the Administrator and not to the purchasers are plainly correct. Section 205 (e), *infra,* pp. 10–11, permits the purchaser to bring suit where he "buys such commodity for use or consumption other than in the course of trade or business", and it further provides that the Administrator may bring suit if the purchaser "is not entitled * * * to bring the action". All the purchasers herein acquired the trucks for use in their businesses. Petitioners contend that the term "use or consumption other than in the course of trade or business" means use or consumption by an ultimate consumer even though in the course of trade or business, so long as there is no resale; and accordingly that the Administrator has the right of action only when the purchase is for resale. But obviously "in the course of trade or business" has a much broader meaning than "for resale", and the court below, together with all other appellate courts to which the issue has been presented

rightly so held. *Lightbody* v. *Russell,* 293 N. Y. 492, 58 N. E. 2d 508; *Bowles* v. *Rogers,* 149 F. 2d 1010 (C. C. A. 7th); *Speten* v. *Bowles,* 146 F. 2d 602 (C. C. A. 8th), certiorari denied, No. 999, 1944 Term; *Bowles* v. *Seminole Rock & Sand Co.,* 145 F. 2d 482 (C. C. A. 5th), reversed on another ground, No. 914, 1944 Term; *Bowles* v. *Glick Brothers Lumber Co.,* 146 F. 2d 566 (C. C. A. 9th), certiorari denied, No. 1213, 1944 Term; *Bowles* v. *Wayne Jones* (C. C. A. 10th), decided September 15, 1945, not yet reported.

The decision of the court below is correct and there is no conflict among the appellate courts. It is respectfully submitted that certiorari should be denied.

J. Howard McGrath,
Solicitor General.

George Moncharsh,
Deputy Administrator for Enforcement,
David London,
Acting Director, Litigation Division,
Albert M. Dreyer,
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Office of Price Administration.

October 1945.